Supreme Court, U.S.
FILED

021379 MAR 17 2003

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No. _____

In The

Supreme Court of the United States

THE CITY OF BURBANK,

Petitioner,

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second District, Division Two

PETITION FOR WRIT OF CERTIORARI

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March 17, 2003

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60 pp

QUESTIONS PRESENTED

The Burbank City Council has been enjoined from allowing "sectarian" prayers at any city council meeting, and has been ordered to advise individuals giving a legislative invocation at all meetings that "sectarian" prayers are not permitted. The following three questions are presented here:

1. Whether the allowance of a single or occasional "sectarian" prayer offered by citizen volunteers at a public meeting of a legislative body constitutes the "advancement" of a particular religious ideology by the legislative body, in violation of the Establishment Clause of the First Amendment to the United States Constitution and the Court's decision in *Marsh v. Chambers*, 463 U.S. 782 (1983)?

2. Does the legislative prayer practice dictated by the California courts – which now requires California legislative bodies to ascertain whether prayers in their meetings are "sectarian" and then ban such prayers under penalty of contempt – violate the Establishment Clause by impermissibly entangling government with religion?

3. Whether a legislative body, which is now required to determine whether a legislative prayer is "sectarian" and to prohibit any such "sectarian" prayer, engages in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment to the United States Constitution and this Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)?

PARTIES TO THE PROCEEDINGS

The Petitioner is the City of Burbank, a municipal governmental entity, organized and existing under the laws of the State of California.

The Respondents are Irv Rubin[1] and Roberto Gandara, both individuals.

[1] Mr. Rubin recently died; however, the injunction remains in effect, as does the wide impact of the court of appeal's published opinion.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The City of Burbank respectfully petitions this Court for a writ of certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two, to review the decision in *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (2002), which held that:

> A. The inclusion of a single or occasional "sectarian" prayer at a city council meeting was an "advancement" of a specific religion by the city council in violation of the Establishment Clause of the U.S. Constitution and the Supreme Court's holding in *Marsh*, *supra*;
>
> B. The city council be enjoined from "allowing" sectarian prayers at city council meetings, and ordered the council to advise persons giving such prayers at city council meetings that "sectarian" prayers are not permitted.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is reported at 101 Cal. App. 4th 1194, 124 Cal. Rptr. 2d 867 (2000), and appears in Appendix A, at App. 1-20. The Court of Appeal's Order Modifying Opinion and Denying Rehearing appears in Appendix B, at App. 21-22. The opinion of the state trial court appears in Appendix C, at

App. 23-30. The California Supreme Court's *en banc* denial of Petition for Review appears in Appendix D, at App. 31.

STATEMENT OF JURISDICTION

The petitioner seeks review by writ of certiorari of the final judgment rendered on the merits by the California Court of Appeal, Second Appellate District, Division Two (Petition for Review denied by the California Supreme Court). The court of appeal's decision was filed on September 9, 2002. (*See* Appendix A.) The court of appeal's Order Modifying Opinion and Denying Rehearing was filed on October 7, 2002. (*See* Appendix B.) The California Supreme Court's denial of the City of Burbank's Petition for Review was filed on December 18, 2002. (*See* Appendix D.) Jurisdiction is conferred upon this Court pursuant to Title 28 U.S.C. § 1257(a).

RELEVANT STATUTES AND REGULATIONS

U.S. Constitution, Amendment I

28 U.S.C. § 1257(a)

STATEMENT OF THE CASE

A. Introduction

This case is about the California court of appeal's unilateral modification of *Marsh v. Chambers*, 463 U.S. 783 (1983), relating to legislative invocations. The California court of appeal's decision affirmed an injunction

banning the inclusion of *any* "sectarian" legislative prayer at the Burbank City Council meetings, and required the City of Burbank and all other legislative bodies in California to censor the content of the invocations on the basis of the viewpoint/ideology expressed therein.

The court of appeal determined that a single invocation which ended with the words "in the name of Jesus Christ," was impermissibly "sectarian" and thus violated the Establishment Clause and this Court's decision in *Marsh*. Further, despite evidence that non-Christians regularly contributed prayers at the city council meetings and that a large number of the Christians offering prayers did not reference Jesus Christ, the court of appeal held that this single prayer conveyed a message that Christianity was being "advanced" by the Burbank City Council, and did not fall within the scope of the legislative prayer sanctioned by the Court in *Marsh*. As a result of this determination, the City of Burbank was enjoined from allowing anyone to give a "sectarian" prayer at city council meetings, and ordered to advise those who volunteered to give the prayer that "sectarian" prayer was not permitted. *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194, 1197 (2002). By extension, the published decision similarly affects all California legislative bodies.

Governmental agencies in California must now tread down a slippery constitutional slope by first examining the invocation to determine whether or not it is "sectarian" and then to prohibit any such "sectarian" prayers from being given at a public meeting. This examination is an unconstitutional entanglement with religion in violation of the Establishment Clause; and, the subsequent prohibition of any such "sectarian" prayers from being given is the most egregious form of content-based discrimination in

violation of the Free Speech Clause of the United States Constitution.

B. The Facts of the Case

The facts of the case are undisputed.[2] Respondent Irv Rubin attended one of the Burbank City Council's weekly meetings at which he heard an invocation given by a local volunteer which ended with the words "in the name of Jesus Christ."[3] He and Roberto Gandara (who was not present at that meeting) filed a lawsuit challenging the legislative invocation as violative of the Establishment Clause.

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[2] *Rubin*, *supra*, at 1197.

[3] The full text of the invocation is the following:

> "Our Father in Heaven, we are grateful to assemble this evening in the capacity of the City Council meeting. We wish to thank thee and express our gratitude for the blessings that we receive each day. We especially are mindful of this week and the Thanksgiving Day to come on which people all over our nation will be expressing gratitude and love unto thee for thy bounteous blessings. [¶] We feel privileged to be a part of this community. We are grateful for those who have stepped forward and have been elected to lead this community. Will thou bless them and give them insight and wisdom and those of the city staff who assist and direct the affairs of the city. [¶] Heavenly Father we are grateful for the youth of this community for they are the future and we ask a blessing upon those who teach and lead the youth that they may inspire them to be their best. [¶] We are grateful heavenly Father for all that thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen."

Rubin, *supra*, at 1198, fn.1.

Since 1953 the City of Burbank has begun each city council meeting with a religious invocation. The invocation is usually given by a member of the non-denominational Burbank Ministerial Association ("BMA"), a group of local clergy and representatives of all the organized religious groups in the City of Burbank. This group is not exclusively Christian. The BMA's long-standing practice has been to circulate among its members a sign-up sheet for volunteers to give the council invocation. The list would be provided to the Burbank City Clerk who would place the name of the volunteer on the agenda. Neither the city council nor the City Clerk had any input into who was to give the invocation and did not control the content or subject matter of the invocation. The BMA members determined among themselves that each would be allowed to individually choose how and in what manner to give the invocation and imposed no restrictions regarding the content of the prayers. *Rubin, supra,* at 1197-98.

The resulting practice was a weekly invocation that differed depending upon the volunteer. Although a majority of the members did not use Jesus Christ in their invocation, those whose training and beliefs compelled them to pray in the name of Jesus Christ did so.[4] *Rubin, supra*, at 1198.

Rubin and Gandara sought injunctive relief in the California state court to prevent the City of Burbank from condoning, allowing and sponsoring all "religious prayers"

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[4] It was undisputed that only twenty per cent of the volunteers giving the legislative invocation mentioned Jesus Christ. The remainder gave more generic prayers. *Rubin, supra*, at 1204.

at the city council meetings. They sought a declaratory judgment that Burbank's practice and custom in allowing the prayers described in the complaint violates the Establishment Clause.

C. The Courts Below

After a bench trial, the trial court ruled in Respondents' favor, finding that "the status of the law today is that non-sectarian prayer is permitted but sectarian prayer is not." (Appendix C, App. 27.) Declaring the single prayer Mr. Robin heard at the Nov. 23, 1999 Burbank City Council meeting to be "sectarian", the trial court found an Establishment Clause violation and enjoined "the inclusion of sectarian prayer in City Council meetings." (Appendix C, App. 27.) The trial court directed the Burbank City Council to "advise" participants that "sectarian prayer as a part of City Council meetings is not permitted under our Constitution." (Appendix C, App. 28.)

An intermediate California appeals court affirmed the judgment of the trial court in a published decision. The California Supreme Court denied the City of Burbank's Petition for Review.

The court of appeal committed two fundamental Constitutional errors in reaching its holding, as further described here:

1. First Constitutional Error: The court of appeal affirmed the trial court's extension of *Marsh* to incorporate a "sectarian" standard or element in its analysis of the individual prayer and the City of Burbank's legislative prayer practice. The court of appeal held that a citizen volunteer's single reference to Jesus Christ in the invocation

conveyed the message that Christianity was being advanced by the City Council over other religions, thus violating the Establishment Clause. *Rubin, supra*, at 1203-04.

The reasoning of the court of appeal followed this path: The *Marsh* decision was "factually predicated" upon invocations from which all references to Jesus Christ had been removed (citing *Marsh,* 463 U.S. at 793, fn.14) – in other words, according to the court of appeal, they were "non-sectarian." *Rubin*, *supra*, at 1203. The court of appeal cited *County of Allegheny v. Greater Pittsburgh ACLU, et al.*, 492, U.S. 573 (1989), for the premise that government must not affiliate itself or officially prefer any one religious denomination over another. Relying on *Allegheny, supra,* the court of appeal thus held that irrespective of the City of Burbank's actual practices, a reference to Jesus Christ in the single prayer at issue conveyed the message that the Burbank City Council was a Christian body and was "advancing a [particular] religious belief." *Rubin, supra.* at 1204.[5] By allowing this single or even an occasional "sectarian" prayer, the city council was evincing its preference for Christianity. *Rubin*, *supra*, at 1205. Because of this apparent "affiliation" with the Christian faith, the Burbank City Council violated the dictates of *Marsh*, *supra*, and the Establishment Clause. *Rubin*, *supra*, at 1204-05. With this tautologically-flawed foundation, the

[5] "By directing the prayer to 'our Father in Heaven . . . in the name of Jesus Christ' the invocation conveyed the message that the Burbank City Council was a Christian body and from this it could be inferred that the council was advancing a religious belief." *Rubin*, *supra*, at 1204.

court of appeal affirmed the trial court's remedy to enjoin the allowance of "sectarian" prayers and order the volunteers to avoid relating any "sectarian" prayers. *Rubin*, *supra*, at 1207.

The court of appeal's reasoning is legally and logically unsound. It has significantly misconstrued *Marsh*. *Marsh* does not use, define, differentiate or in any manner incorporate the term "sectarian" into its analysis. By exhorting courts not to evaluate the content of individual prayers unless the prayer *opportunity* is exploited to advance or disparage one faith over another, *Marsh* intended to steer clear of the very sort of rigid and mechanical analysis which the court of appeal used in this case. Yet all California legislative bodies now must undertake such an analysis.

The court of appeal's reliance on *Allegheny*, *supra* (which addressed religious displays), as support for its conclusion that *any sectarian prayer* was violative of the Establishment Clause, *Rubin*, *supra*, at 1202, is misplaced. In *Allegheny*, the focus of the majority's holding was not on the fact that the creche was a "sectarian" religious expression, but rather that it was being displayed in a location that was otherwise not open to all on an equal basis. *Id.*, 492 U.S. at 589-600. This very same ostensibly "sectarian" expression, i.e., a creche, was held in *Lynch v. Donnelly*, 465 U.S. 668 (1984), not to violate the Establishment Clause because of the context of its display. The Court, in *Allegheny*, *supra*, distinguishes its holding from that in *Lynch*, *supra*, on the basis of the *context* of the activity (religious displays on public property). *Id.*, 401 U.S. at 595. In *Lynch*, *supra*, the Court employed a "reality" test, i.e., whether "in reality" the invocation establishes or tends to establish or advance a religious faith. "Rather

than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith – as an absolutist approach would dictate – the Court has scrutinized . . . official conduct to determine, whether, *in reality,* it establishes a religion or religious faith, or tends to do so. *See Walz* [*v. Tax Commission*, 397 U.S. 664, 669 (1970).]" *Lynch*, 465 U.S. at 677-78. Conduct or activities that "merely happens to coincide or harmonize with the tenets of some . . . religions" or which has "indirect," "remote," or "incidental" benefit upon religion," does not violate the Establishment Clause. *Lynch,* 465 U.S. at 682-83 (quoting *McGowan v. Maryland,* 366 U.S. 420, 442 (1961)).

The California court of appeal's reliance on *Allegheny* is yet another misinterpretation of this Court's Establishment Clause holdings and is simply wrong. "We expressly distinguished that site [in *Allegheny*] from the kind of public forum at issue here, and made clear that if the staircase were available to all on the same terms" it would not violate the Establishment Clause. *Capitol Square v. Pinette*, 515 U.S. 753, 765 (1995).

2. *Second Constitutional Error*: The court of appeal affirmed the trial court's order to the city council to engage in the scrutiny and censorship of legislative prayers on the basis of the viewpoint or ideology expressed in order to *protect against* Establishment Clause violations. *Rubin, supra*, at 1205.

In affirming the content-based censorship requirement of the trial court's decision, the court of appeal here mistakenly relied on distinguishable school prayer decisions, including *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290 (2000), and *Cole v. Oroville Union High*

School Dist. 228 F.3d 1092 (9th Cir. 2000). *Rubin, supra*, at 1206. The court of appeal reasoned that an observer would likely perceive the invocation as carrying the City's "seal of approval" and thus, content-based restrictions imposed by the government would be constitutional. *Rubin, supra*, at 1206.

This Court has specifically noted that school prayer cases are fundamentally different from legislative prayer cases, and hence are not analogous here. "Inherent differences between the public school system and a session of a State legislature distinguish this case from *Marsh v. Chambers*. . . . The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend [graduation ceremonies]. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for the following three reasons:

(1) The court of appeal established a new and different standard for reviewing the constitutionality of legislative invocations by adding the element of "sectarian" to the decision established by the Court in *Marsh*. This new standard, which is applicable to all public entities throughout the State of California who have or may desire to have legislative invocations, significantly misinterprets

and modifies *Marsh,* which has remained a steady constant in Establishment Clause jurisprudence. The court of appeal focused on an individual prayer, and not the City of Burbank's overall legislative invocation policies and practice, explicitly ignoring *Marsh*'s unequivocal instruction *not* to parse the content of an individual prayer where "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh, supra,* 463 U.S. at 795-796.

(2) This Court's precedents have been displaced by the remedy imposed by the court of appeal compelling California public entities to engage in a form of viewpoint or ideology censorship of the content of the speakers' legislative invocations. This Court has explicitly rejected as an "*egregious* form of content discrimination" a practice in which an otherwise permissible form of speech (legislative prayer) is restricted on the basis of the speaker's motivating ideology. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *see also, Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Yet, legislative bodies in California now must censor prayers and prohibit individuals from participating who – either by religious compulsion or simple choice – invoke a reference to a specific religious figure.

(3) In order to comply with the court of appeal's orders enjoining "sectarian" prayer from city council and other meetings of legislative bodies

in California, these public entities must necessarily engage in an inquiry into the significance of the words and practices of religious speech in order to make a determination as to what is or is not "sectarian." These inquiries unconstitutionally entangle government with religion. *Widmar v. Vincent*, 454 U.S. 263 (1981).

I. A SINGLE OR OCCASIONAL "SECTARIAN" PRAYER OFFERED BY A CITIZEN VOLUNTEER AT A PUBLIC MEETING OF A LEGISLATIVE BODY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE; WHETHER THE PRAYER IS "SECTARIAN" OR "NON-SECTARIAN" IS NOT AN ELEMENT OF THE *MARSH* HOLDING.

A. Subject Matter Dictates The Divergent Approaches to Analyzing Establishment Clause Cases

Establishment Clause jurisprudence consists of a subtle and nuanced body of law evidencing bold distinctions between prayer, which opens a legislative session or court proceeding, and the confluence of religion and government under other circumstances. The opening of public legislative sessions with prayer is "deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, *supra*, 463 U.S. at 786. In contrast are the many, varied decisions that address the Establishment Clause in other situations. These decisions are extremely varied and dependent on their subject matter. For instance, religious displays on public property are governed by one set of standards. *Lynch, supra*, *Allegheny, supra*. Government

aid to religion or religiously sponsored institutions yields other nuances. *Mitchell v. Helms*, 530 U.S. 793 (2000). The use of public facilities by religious groups carries with it other types of elements, including Free Speech inquiries. *Good News Club*, *supra*. School prayer cases, like the others mentioned above, have yielded yet another unique analytical system. *Santa Fe Independent School District*, *supra*.

Until the decision from the California court of appeal here, legislative prayers followed the clear dictates of *Marsh*, which has not been overruled, disapproved, or modified by this Court in *any manner*. In *Marsh*, the Court instructed that, "the content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. *This being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.*" *Marsh*, *supra*, 463 U.S. at 795-96, emphasis added.

The Court did not scrutinize the content of individual invocations in *Marsh*, did not differentiate between "sectarian" or "non-sectarian," and it did not "factually predicate" its decision on the content of the invocation, as the court of appeal mistakenly states. *Rubin, supra*, at 1203. The fact that specific references to Jesus Christ had recently been removed and replaced with a "Judeo-Christian" invocation was simply noted in footnote 14 in *Marsh*. However, a predominantly Judeo-Christian prayer tradition would not necessarily seem "non-sectarian" to practitioners of Shinto, Islam, Buddhism, Hinduism, or other non-Judeo-Christian religions. Further, it belies logic to suggest that the *Marsh* court would bother with its "instruction" to "courts" not to concern themselves with

parsing or sensitively evaluating the content of a particular prayer, if in fact their decision was "factually predicated" on the specific "Judeo-Christian" content of the legislative prayers at issue in that case.

As set forth above, the court of appeal relies heavily on the *Allegheny, supra,* decision. There is, however, no legal standard in *Allegheny* applicable to or appropriate for analyzing legislative prayer issues. Much of the discussion in *Allegheny* focused on the three-pronged test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Marsh* specifically avoided the *Lemon* test, which has been repeatedly criticized by members of the Court.[6]

Before *Marsh*, the Court applied the *Lemon* test to every Establishment Clause case decided between 1971 and 1984. *See Wallace v. Jaffree,* 472 U.S. 38, 63 (1985) (Powell, J., concurring). But the Court rejected the *Lemon*

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[6] Chief Justice Rehnquist has said that he sees "little use" in the *Lemon* test, a test that in his view "has no basis in the history of the Amendment it seeks to interpret, is difficult to apply and yields unprincipled results. . . . " *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Rehnquist, C.J., dissenting). Justice O'Connor has repeatedly indicated a preference for the endorsement test, noting the "difficulties inherent in the Court's use of the test articulated in *Lemon*." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 347-48 (1987) (O'Connor, J., concurring). Justice Kennedy notes that the Supreme Court's decisions "often question [the *Lemon* test's] utility in providing concrete answers to Establishment Clause questions," adding that "substantial revision" of the test "may be in order." *Allegheny, supra*, 492 U.S. at 655-56 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy has further said that he "does not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area." *Id.* Justices Scalia and Thomas have likewise negatively viewed *Lemon*. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., joined by Thomas, J., concurring).

analysis for legislative prayer in its *Marsh* decision, focusing instead on the "deeply embedded" traditions of this country and the Founding Fathers' own acts in providing for paid legislative chaplains at the same time as they were drafting and approving the Establishment Clause. *Marsh*, *supra*, 463 U.S. at 786, 788. Indeed, the Sixth Circuit refers to *Marsh* as one of three Establishment Clause "tests"; the *Lemon* test and the "endorsement" test are the other two.[7] Because *Marsh* is the only case which addresses legislative prayer and because *Marsh* carved out such a unique analytical structure relative to the other lines of Establishment Clause jurisprudence, it should not be for a California state court to alter that analysis by injecting a factor (i.e., "sectarian") that the Court did not incorporate into its own analysis.

Finally, an important element of the *Allegheny* majority's analysis was a differentiation between the secular and religious characterizations of the displays themselves. This does not work for prayer. Prayer is by its nature religious. Legislative prayer is an accepted form of ceremonial deism. "[L]egislative prayer (like the invocation that commences each session of this Court) is a form of acknowledgment of religion that 'serve[s] in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. [Citations.] The function and history of this form of ceremonial deism suggest that 'those practices are not understood as conveying government

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[7] *ACLU v. Capitol Square*, 243 F.3d 289, 306 (6th Cir. 2001).

approval of particular religious beliefs.'" *Allegheny, supra,* 492 U.S. at 595, fn.46, citing Justice Brennan's dissent in *Lynch, supra,* 465 U.S. at 693, 717. Further, the purpose of legislative invocations is, as Justice O'Connor states in her concurring opinion in *Mitchell v. Helms,* 530 U.S. 793, 856 (2000), "[for] government officials [to] invoke spiritual inspiration entirely for their own benefit *without directing any religious message at the citizens they lead.*" (Emphasis added.)

Whereas in religious display cases the focus is on the secular or religious characterization of the particular display and the context of the forum in which it is displayed, the Courts' focus in the school prayer cases has been the forum in which the prayer is given regardless of whether or not it is sectarian. In *Lee, supra*, where a nonsectarian prayer prepared by school officials was to be given by a rabbi at a middle school graduation, the Court took great care to emphasize that *whether or not* the prayer was sectarian was not the distinguishing factor in its analysis. The distinguishing factor was the atmosphere in which the prayer was given, i.e., a school graduation ceremony where there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. [citations.] . . . [P]rayer exercises in public schools carry a particular risk of indirect coercion." *Lee, supra*, 505 U.S. at 592.

In the legislative prayer context, courts should concentrate on whether the "prayer opportunity" has been "exploited to proselytize or advance any one, or to disparage any other, faith or belief. . . . " *Marsh, supra*, at 795-96. Fixating on the content of one single prayer – as the court of appeal did here – is not an appropriate method to

determine an Establishment Clause violation. The applicable standard for evaluating potential Establishment Clause violations does not include analyzing whether the prayer is "sectarian."

B. The *Marsh* Court Does *Not* Direct Courts to Look at Whether an Individual Prayer Is "Sectarian" or "Non-Sectarian."

As indicated above, courts have followed very different analytical paths in deciding other types of Establishment Clause cases (e.g., school prayer, religious displays, aid to religion, etc.). In spite of the analytical twists and turns taken in these other types of Establishment Clause cases, *Marsh* has remained undisturbed. Further, the issue of the content of legislative prayer has not found its way back to this Court in any form.

Marsh does *not* direct any court to consider whether the content of an individual prayer renders it "sectarian" or not. *Marsh* does not suggest finding an Establishment Clause violation if the prayer is in fact "sectarian," let alone direct the issuance of an injunction against such prayer. California public agencies should not be controlled by an interpretation which is at odds with the law governing legislative invocations in the other forty-nine states.

II. REGULATING THE CONTENT OF LEGISLATIVE PRAYER ON THE BASIS OF THE IDEOLOGY EXPRESSED THEREIN IS CONSTITUTIONALLY IMPERMISSIBLE VIEWPOINT DISCRIMINATION.

Equally disturbing is the remedy fashioned by the trial court and approved by the court of appeal requiring

public entities to censor the content of the invocation on the basis of the ideology expressed therein. By restricting those whose traditions and beliefs about prayer require them to pray in the name of Jesus Christ or another deity, while allowing all others to pray in a manner that is consistent with their beliefs, public entities are forced to discriminate on the basis of the *speaker's* viewpoint or ideology. That is a violation of the Free Speech Clause. Further, this Court has held that "[v]iewpoint discrimination is . . . an *egregious* form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn.*, 460 U.S. at 46." *Rosenberger, supra,* 515 U.S. at 829. (Emphasis added.)

The Court has reinforced this tenet in its recent line of decisions relating to the forum in which the speech is presented. In a limited public forum setting at which a government entity could legitimately exclude certain classes of speech, the entity cannot restrict speech which is otherwise permitted because of the viewpoint expressed. *See*, e.g., *Perry Ed. Assn.*, *supra*; *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Rosenberger, supra,* 515 U.S. at 845-46.

Where an invocation at the beginning of a legislative session is a lawful constitutional practice, it cannot be restricted by the legislative body on the basis of the viewpoint or ideology expressed within the invocation. "The State's power to restrict speech [even in a limited public forum] . . . is not without limits. The restriction must not discriminate against speech on the basis of viewpoint." *Good News Club, supra,* 533 U.S. at 106. So, the court of appeal's remedy cannot be applied here.

III. REQUIRING THE CITY COUNCIL TO DETERMINE WHETHER A LEGISLATIVE PRAYER IS SECTARIAN UNCONSTITUTIONALLY ENTANGLES THE GOVERNMENT IN RELIGIOUS MATTERS.

In order for the Burbank City Council to comply with the mandates of the court of appeal to prohibit "sectarian" prayer at the public meetings, the city council must first determine whether a prayer is "sectarian." In order to do that, the council must necessarily assess the religious theories and beliefs of the speaker. This Court has held that where the government engages in a review of speech to determine the underlying philosophical assumptions respecting a person's religious theories and beliefs, such a course of action not only would violate the Free Speech Clause, but also would be considered to "[foster] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger, supra,* 515 U.S. at 846. This impermissibly entangles the government in religion.

Further, as the Court noted in *Lee, supra,* the First Amendment's Religion Clauses, in addition to preventing governmental advancement of a particular faith, also protect against governmental interference with religion. "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference." *Id.*, 505 U.S. at 589.

The court of appeal's "remedy" to correct the ostensible Establishment Clause violation leads public agencies directly into an unconstitutional entanglement with religion. This entanglement violates *both* the Establishment Clause and Free Speech clause.

CONCLUSION

The issues presented in this Petition are worthy of this Court's attention. The instant case was prompted by Respondent Rubin's offense at hearing a Christian prayer at the beginning of an official government meeting. It has ended at this juncture with an even greater offense – the unprecedented censorship of the free speech rights of volunteers who proffer the invocation and the unconstitutional entanglement of the government in religious matters.

It is anathema to the First Amendment to prohibit the participation in the legislative invocation opportunity by those whose prayer traditions, beliefs, or choice prompt them to pray in the name of a specific religious figure, while all others who do not pray in that manner are permitted to participate. "'*We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.*'" *Rosenberger*, *supra*, 515 U.S. at 846, concurring opinion, O'Connor, J., quoting from *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 714 (1994).

Government does not belong in the business of telling people how or what to say when they pray. Similarly, affording different individuals the opportunity to share their own individual prayers in a constitutionally-sanctioned forum

does not intrude on or threaten the requisite governmental neutrality toward religion. However, governmental censorship of this particular form of speech, such as that required by the court of appeal, *is* inconsistent with the Establishment and Free Speech Clauses, and requires exacting scrutiny by this Court. The millions of California citizens impacted by the court of appeal's decision deserve the uniformity enjoyed by the citizens of the other forty-nine states as provided in the unmodified, unexpanded *Marsh* decision of the Court. This Court and not the California Second District Court of Appeal should control the continuing vitality of *Marsh*.

For the above stated reasons, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Submitted this 17th day of March, 2003.

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APPENDIX A

Filed 9/9/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IRV RUBIN et al., Plaintiffs and Respondents, v. CITY OF BURBANK, Defendant and Appellant.	B148288 (Los Angeles County Super. Ct. No. BC 221942)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alexander H. Williams III, Judge. Affirmed.

Dennis A. Barlow, City Attorney and Juli C. Scott, Chief Assistant City Attorney for Defendant and Appellant.

John L. Gordon, Stuart J. Roth, David A. Cortman, Gregory N. Bryl and American Center for Law and Justice for Mayor Margaret Clark, Zane Han, Gary Clark, Joe Velasquez and Ricardo Quevedo as Amici Curiae on behalf of Defendant and Appellant.

Richards, Watson & Gershon, T. Peter Pierce, Amy Greyson and Carrie H. Ahn for Thirty-Four California Cities as Amici Curiae on behalf of Defendant and Appellant.

Roger Jon Diamond for Plaintiffs and Respondents.

Edward Tabash for Council for Secular Humanism as Amicus Curiae on behalf of Plaintiffs and Respondents.

* * *

Objecting to an invocation given at a Burbank City Council meeting which ended with an expression of gratitude and love "in the name of Jesus Christ," plaintiffs sought and were granted injunctive and declaratory relief against the City. The trial court ruled that the inclusion of "sectarian prayer" in city council meetings violated the Establishment Clause of the United States Constitution, and it enjoined the City from allowing sectarian prayer at city council meetings. The trial court also ordered the City to "advise anyone conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted." The City has appealed and contends the judgment is "contrary to a firmly established body of constitutional jurisprudence that holds that the practice of legislative invocations which do not proselytize, promote or disparage any single religion" do not violate the Establishment Clause of the First Amendment. The City further contends that the court order amounts to unconstitutional censorship and viewpoint discrimination.

Because we conclude the invocation violated the Establishment Clause of the First Amendment of the United States Constitution under *Marsh v. Chambers* (1983) 463 U.S. 783, and the court's order did not constitute censorship or viewpoint discrimination under the Free Speech and Exercise Clauses, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

The facts are not disputed. Since 1953 the City of Burbank has had a practice of beginning each city council meeting with an invocation. The invocation is usually given by a member of the Burbank Ministerial Association (BMA), a non-denominational organization of clergy and representatives of other organizations, such as the YMCA, whose members meet for the purpose of fellowship among the religious leaders of the community. BMA is not entirely Christian, but there are, for example, no Moslem, Buddhist, Hindu or Bahai members in the group.

It was the practice of the BMA to circulate a sign-up sheet among its members for volunteers to give the council invocation. The list of volunteers was provided to the city clerk who placed the name of a volunteer on the agenda. Neither the city council nor the city clerk had any input in determining the subject matter or content of the invocation. Although the members of the BMA agreed among themselves that they would be respectful of their members' various and diverse beliefs, they imposed no restrictions on the content of the invocation.

Plaintiff Irv Rubin, who is of the Jewish faith, was present at the city council meeting on November 23, 1999 to give his opinion on a proposed plan for expansion of the Burbank Airport. A member of BMA, who was a minister of the Church of Jesus Christ of Latter Day Saints, gave the invocation which opened the meeting. The invocation concluded as follows: "We are grateful heavenly Father for all that thou has poured out on us and we express our

gratitude and our love in the name of Jesus Christ. Amen."[1]

Plaintiff Roberto Alejandro Gandara, who was raised as a Catholic, was present at an earlier city council meeting at which an invocation was given in which Jesus Christ had not been mentioned.

Rubin and Gandara filed suit for declaratory and injunctive relief, challenging the practice of the City to begin the city council meetings with religious prayers invoking the name of Jesus Christ. After trial, the court found the prayer recited on November 23, 1999 was "sectarian" and violated the Establishment Clause of the First Amendment to the United States Constitution. The court permanently enjoined the City from "knowingly and intentionally allowing sectarian prayer at City Council meetings." The City was ordered to "advise anyone

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[1] The entire test of the invocation was as follows: "Our Father in Heaven, we are grateful to assemble this evening in the capacity of the City Council meeting. We wish to thank thee and express our gratitude for the blessings that we receive each day. We especially are mindful of this week and the Thanksgiving Day to come on which people all over our nation will be expressing gratitude and love unto thee for thy bounteous blessings. [¶]We feel privileged to be part of this community. We are grateful for those who have stepped forward and have been elected to lead this community. Will thou bless them and give them insight and wisdom and those of the city staff who assist and direct the affairs of the city. [¶] Heavenly Father we are grateful for the youth of this community for they are the future and we ask a blessing upon those who teach and lead the youth that they may inspire them to be their best. [¶]We are grateful heavenly Father for all that thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen."

conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted."

The City timely appealed the judgment.

CONTENTIONS ON APPEAL

The City contends that the trial court erred, asserting (1) pursuant to *Marsh v. Chambers, supra*, 463 U.S. 783, legislative invocations do not violate the Establishment Clause, and the content of legislative prayer is not to be scrutinized where it is not used to proselytize, advance or disparage any one religion; (2) the rule of *Marsh* has not been diluted or abrogated by other Establishment Clause cases; and (3) the regulation of the content of prayer is impermissible viewpoint discrimination.

Three amici curiae briefs have been filed. Margaret Clark et al., representing a mayor, clergy, and other private citizens who reside in cities within the jurisdiction of this court, and Thirty-Four California Cities have filed amici briefs in support of the City of Burbank.[2] The Council for Secular Humanism, a non-profit organization promoting the rights of atheists, has filed an amici brief in support of respondents Rubin and Gandara.[3]

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[2] Amici in support of the City express concern about the effect the trial court's decision will have on their own cities' practice of prayers at council meetings, and that they too will be forced to end the practice of allowing "sectarian" prayers at their council meetings.

[3] The Council for Secular Humanism takes the position that no branch of government should favor religion over non-belief.

DISCUSSION

Standard of Appellate Review

We are presented with constitutional issues, which we review de novo. (*Berry v. City of Santa Barbara*(1995) 40 Cal.App.4th 1075, 1082.) We must decide whether the orders of the trial court violate the First Amendment to the United States Constitution, independent of the trial court's ruling or reasoning. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.)

Legislative invocations do not violate per se the Establishment Clause.

Both sides agree that this case is governed by *Marsh v. Chambers, supra*, 463 U.S. 783, the only United States Supreme Court case that has decided the issue of legislative prayer. City urges that the judgment of the trial court is an unconstitutional extension of *Marsh*. Respondents argue that the trial court correctly found the invocation unconstitutional.[4]

The issue presented in *Marsh*, as stated by Chief Justice Burger writing on behalf of the majority, was "whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment." (*Marsh, supra*, 463 U.S. at p. 784.) In *Marsh*, a member of the Nebraska Legislature sought to

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[4] Respondents, while otherwise taking the position that *Marsh* should be overruled, concede that for the purposes of this case *Marsh* is controlling.

enjoin this practice claiming that it violated the Establishment Clause. The District Court "held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds." (*Id.* at p. 785.) On appeal, the Eighth Circuit applied the three-part test established by the court in *Lemon v. Kurtzman* (1971) 403 U.S. 602. The *Lemon* test set forth a standard for evaluating statutory violations of the Establishment Clause finding no violation if the following were proven: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (*Id.* at pp. 612-613, citations omitted.)[5] The Eighth Circuit held that the Nebraska policy violated all three elements of the test, and prohibited the state from continuing its established practice. Certiorari was granted by the Supreme Court.

After a review of the historical precedent of prayer in the public legislative context, the Supreme Court found that such prayer was "deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." (*Marsh*, *supra*, 463 U.S. at p. 786.) The court noted, "On September 25, 1789, three days after congress authorized the appointment of

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[5] For application of this standard, see, e.g., *Committee for Public Education v. Regan* (1980) 444 U.S. 646, 653; *Committee for Public Education v. Nyquist* (173) 413 U.S. 756, 772-773; *Hunt v. McNair* (1973) 413 U.S. 734, 741.

paid chaplains, final agreement was reached on the language of the Bill of Rights. . . . Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." (*Id.* at 788.)

The majority in *Marsh* did not evaluate Nebraska's prayer tradition under the *Lemon* test. Instead, as Justice Brennan noted in dissent, the court "carv[ed] out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer." (*Marsh*, *supra*, 463 U.S. at p. 796 (dis. opn. of Brennan, J.).) The majority concluded that the unique history of legislative prayer, which had been established by the members of the First Congress and practiced over two centuries, evidenced the lack of threat to the Establishment Clause from legislative prayer: "We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation [citation], beneficial grants for higher education [citation], or tax exemptions for religious organizations [citation]." (*Marsh*, *supra*, 463 U.S. at pp. 790-791.)

In reviewing the specific prayer in question, the court in *Marsh* found that its characteristics, that a Presbyterian clergyman had been selected to give the invocation for 16 years, that the chaplain was paid at public expense, and that the prayers were in the Judeo-Christian tradition, did not invalidate the practice. (*Marsh*, *supra*, 463 U.S. at p. 793.) But the court specifically noted in the margin that "[a]lthough some of [the] earlier prayers were often explicitly Christian, [the minister] removed all

references to Christ after a 1980 complaint from a Jewish legislator." (*Id.* at p. 793, fn. 14.)

Finally, the court set forth what has since been characterized as the *Marsh*, test: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." (*Marsh*, *supra*, 463 U.S. at pp. 794-795.)

The trial court's review was not an unconstitutional extension of Marsh.

The City, in defending its practice of opening the city council meetings with prayer, contends the trial court misapplied the *Marsh* test and created its own legal standard "which has no precedential base" and is "contrary to established law." The City asserts the invocations did not serve the purpose of proselytizing, advancing or disparaging any one religion and therefore did not violate the Establishment Clause. Based on that view, the city argues the trial court violated the explicit holding in *Marsh* when it evaluated and parsed the content of the prayer given as the council's invocation on November 23, 1999, improperly focusing on the content of the very last sentence of the prayer that referred to "Jesus Christ" and basing its determination that the prayer was sectarian on that reference alone.

The City and *amici* in support of the City's position contend that under *Marsh* the appropriate test involves an examination of the proselytizing or disparaging content of

the prayer, rather than a determination of the "sectarian" nature of an individual prayer. They argue that the *Marsh* court's mention in footnote 14 of the removal of all references to Christ in the Nebraska prayer is merely dicta in an anecdotal footnote, and this factor is never substantively addressed in the opinion. Thus, the City argues that the trial court's apparent reliance on footnote 14 was misplaced and that the trial court "created its own legal standard which has no precedential support and is in fact contrary to the law."

Respondents contend that the prayer in *Marsh* survived constitutional scrutiny because any reference to Jesus Christ had been removed and that *Marsh* supports the decision of the trial court here.

Amici Margaret Clark et al. argue that as long as the invocation was not used to advance the Christian faith or disparage other faiths, the prayer passed constitutional muster under *Marsh*.

It cannot reasonably be argued that the prayer here, with a specific reference to Jesus Christ, is on the same constitutional footing as the prayer before the court in *Marsh*, from which all reference to a specific religion had been excised. It was therefore incumbent upon the trial court to determine whether "the prayer opportunity had been exploited to proselytize or advance any one, or to disparage any other, faith or belief." (*Marsh*, *supra*, 463 U.S. at pp. 794-795.)

In *Allegheny County v. Greater Pittsburgh ACLU* (1989) 492 U.S. 573, the court considered whether a December holiday display of a crèche in a county courthouse and a menorah outside a city and county building violated the Establishment Clause. In deciding that

question the majority stated that "[w]hatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). 'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.' [Citation.]" (*Id.* at p. 605.) Nor can government appear "to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (*Id.* at p. 594, quoting from *Lynch v. Donnelly* (1984) 465 U.S. 668, 687.)

In response to Justice Kennedy's concern about the court's "latent hostility" or "callous indifference" towards religion, Justice Blackmun writing for the majority stated: "On the contrary, the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discrimination among citizens on the basis of their religious faiths. [¶] A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." (*Allegheny*, *supra*, 492 U.S. at p. 610.)

The court in *Allegheny*, differentiating between the secular and religious aspects of the celebration of Christmas, stated: "Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation

saying: 'We rejoice in the glory of Christ's birth!'), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians." (*Allegheny*, *supra*, 492 U.S. at pp. 611-612.)

The court's discussion of *Marsh* in *Allegheny* reflects that it considered the removal of references to Christ to have been essential to the *Marsh* ruling: "Indeed, in *Marsh* itself, the Court recognized that not even the 'unique' history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" (*Allegheny*, *supra*, 492 U.S. at p. 603.)

It is clear that the factual predicate upon which the Supreme Court ruled in *Marsh* was a legislative invocation from which all references to a particular religion have been purposely excised. We therefore agree with respondents that the trial court's decision was correct under *Marsh*.

The reference to "Jesus Christ" in the invocation violated the Establishment Clause.

We review the invocation at issue in light of the foregoing considerations. The expression of gratitude and love "in the name of Jesus Christ" was an explicit invocation of a particular religious belief. By directing the prayer to "Our Father in Heaven . . . in the name of Jesus Christ" the invocation conveyed the message that the Burbank City Council was a Christian body, and from this it could be inferred that the council was advancing a religious belief.

The City argues that because only about 20 percent of the volunteers providing the legislative prayer mentioned Jesus Christ in the invocation, it is clear that the prayer opportunity was not being exploited to advance or disparage any one faith or belief. This argument promotes a test that unless a certain incidence of unconstitutional prayer is proven, it cannot be established that one religious belief or faith is being proselytized or advanced over another. We disagree. Rather, we interpret *Marsh* to mean that *any* legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause.

We therefore conclude that, in accordance with the holding in *Marsh*, the invocation offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions. The trial court was correct in its finding.

The prohibition against "sectarian prayer" is within the mandate of Marsh.

City contends that imposing a standard prohibiting "sectarian prayer" is beyond the mandate of *Marsh*, and, indeed, that sectarian prayer in the context of a legislative invocation is constitutionally permitted. City argues that the trial court's review exceeded the only criteria imposed by *Marsh* to assess whether the "prayer opportunity has been exploited" for the purposes of proselytizing, advancing, or disparaging any one belief or faith. (*Marsh*, *supra*, 463 U.S. at p. 795.) We disagree.

As we have discussed, in light of the specific references to the Christian faith in the invocation, as distinguished from the invocation in *Marsh* from which any such reference had been excluded by design, the trial court properly considered whether the prayer opportunity had been exploited for the purpose of proselytizing, advancing or disparaging any one belief or faith. In deciding that it had, the court found the reference to Jesus Christ rendered the prayer "sectarian."

"Sectarian" is defined as relating to or characteristic of a sect.[6] A "sect" is defined as an organized ecclesiastical body, or a religious denomination.[7] The trial court's characterization of the invocation as "sectarian" was merely a definitional determination that the invocation unconstitutionally communicated a preference for one religious faith (or sect) over another. Returning again to the *Marsh* test, in concluding that the prayer was sectarian, the trial court

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[6] Webster's 10th Collegiate Dictionary (2001) page 1053.

[7] Webster's 10th Collegiate Dictionary, *supra*, page 1053.

determined that the prayer opportunity had been exploited to advance one faith, Christianity, over another.[8]

Requiring the council to advise prayer participants that sectarian prayers are not permitted does not amount to unconstitutional censorship or viewpoint discrimination.

City contends that by ordering the City to advise those who volunteer to give the council invocation that sectarian prayers are not permitted, the City is placed in the position of censoring the speech of those who seek to address the city council. City further contends that by "restricting those whose prayer traditions and beliefs require them to pray in the name of Jesus Christ, while allowing others to pray in a manner consistent with their beliefs" the trial court engaged in discrimination based on viewpoint or ideology, in violation of the speaker's right to freedom of speech under the First Amendment. City relies on *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37,[9] *Cornelius v. NAACP Legal Defense & Ed. Fund* (1985) 473 U.S. 788, and *Rosenberger v. Rector and*

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[8] We interpret "exploit" here to mean to make productive use of for one's own advantage. (Webster's 10th Collegiate Dict., *supra*, page 409.)

[9] In *Perry*, a divided Supreme Court held that permitting access to teachers' mailboxes and interschool mail to an incumbent teachers' union and denying access to a rival union did not amount to viewpoint discrimination, because government can impose reasonable regulations on speech, as long as the limitations are necessary to serve a compelling state interest, are narrowly drawn to achieve that end, and are not an effort to suppress expression merely because public officials oppose the speaker's view. (*Perry*, *supra*, 460 U.S. at pp. 45-46.)

Visitors of VA. (1995) 515 U.S. 819[10] to support its contention.

City correctly points out that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (*Rosenberger*, *supra*, 515 U.S. at p. 829.) But this does not create carte blanche for the speaker.

Whether the trial court's order amounted to unconstitutional censorship or viewpoint discrimination depends on the nature of the speech involved and the manner of restriction imposed. The question of whether prayer in the context of student-led, student-initiated invocations before football games at a public school was "private speech" protected by the Free Speech and Free Exercise Clauses of the First Amendment was answered by the Supreme Court in *Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290. In concluding that such speech was not "private speech," the court noted that "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events." (*Id.* at p. 302.) "We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a

[10] In *Rosenberger*, a divided Supreme Court held that denial of funding to a student newspaper with a Christian viewpoint from a university fund created to pay printing costs of student publications was unconstitutional viewpoint discrimination, in that any benefit to religion would be incidental to the government's provision of services on a religion-neutral basis, and denial of funding would be based on the message being communicated. (*Rosenberger*, *supra*, 515 U.S. at pp. 829, 843-844.)

part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment." (*Id.* at p. 307.)

As to whether such speech would be perceived as public or private speech, the *Santa Fe* court said: "In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.' [Citation.] Regardless of the listener's support for, or objection to, the message, an objective [participant] will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." (*Santa Fe*, *supra*, 530 U.S. at p. 308.) The court held that the invocation delivered over the school's public address system, supervised by school faculty, and in accordance with the school policy that explicitly encourages public prayer was not "private speech." (*Id.* at p. 310.)

The Ninth Circuit in *Cole v. Oroville Union High School Dist.* (9th Cir. 2000) 228 F.3d 1092, followed *Santa Fe* and concluded that a public school district's refusal to allow students to deliver sectarian and proselytizing valedictory speeches as part of a graduation ceremony was necessary to avoid violating the Establishment clause, and therefore did not violate the speaker's free speech rights. (*Cole*, at p. 1102.) "The invocation would not have been private speech, because the District authorized an invocation as part of the graduation ceremony held on District property. . . ." (*Ibid.*)

In light of the fact that the legislative invocation given at the Burbank City Council meeting took place on government property, was authorized by the long standing policy of the city council, was part of the official agenda of the council meeting, and was for the purpose of calling for spiritual assistance in the work of the legislative body, we are satisfied that it was not "private speech." As in *Santa Fe* and *Cole*, an objective observer familiar with the City's policy and implementation would likely perceive that the invocation carried the City's seal of approval. As such those who provide legislative invocations at the Burbank City Council meetings are subject to the requirement that the prayers should comport with the First Amendment.

"For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (*Perry*, *supra*, 460 U.S. at p. 45.) "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Id.* at p. 46.)

We can think of no more compelling interest than safeguarding the Establishment Clause of the First Amendment to support the restriction ordered here. As stated in *Lynch v. Donnelly* (1984) 465 U.S. 668, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions,

give the institutions access to government or governmental powers not fully shared by non adherents of the religion, and foster the creation of political constituencies defined along religions lines. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." (*Id.* at pp. 668, 687-88 (conc. opn. of O'Connor, J.).)

The interest in protecting and safeguarding the fundamental constitutional right to maintain a separation between church and state and to demand neutrality when the interest of religion and government intersect is increasingly more important as our nation becomes more pluralistic. In ordering that the City not permit sectarian prayer at city council meetings and requiring the City to advise those who participate in conducting prayer at city council meetings of this limitation, the trial court drew the regulation as narrowly as possible. The only restriction being imposed on the prayer is that it not be sectarian, that is, that the invocation not be used to advance one faith or belief over another.[11]

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[11] Amicus Thirty-Four California Cities presents an argument in their brief that the terms of the trial court's injunction are ambiguous and therefore unenforceable. This issue was never raised by the parties before the trial court nor discussed by the parties on appeal. While we recognize that this court may consider new issues raised by an amicus on appeal (see *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 709-713),

(Continued on following page)

DISPOSITION

The judgment of the trial court fully comports with *Marsh v. Chambers, supra*, 463 U.S. 783, and is affirmed. Respondents are awarded costs of appeal.

CERTIFIED FOR PUBLICATION

_____, J.
DOI TODD

We concur:

_____, Acting P.J.
NOTT

_____, J.
ASHMANN-GERST

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we decline to do so here. We note that City has not referred to this issue in its reply brief.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IRV RUBIN et al., Plaintiffs and Respondents, v. CITY OF BURBANK, Defendant and Appellant.	B148288 (Los Angeles County Super. Ct. No. BC 221942) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT] (Filed Oct. 7, 2002)

THE COURT:

It is ordered that the opinion filed herein on September 9, 2002, be modified as follows:

On page 15, footnote 11 has been modified to read:

Amicus Thirty-Four California Cities presents an argument in their brief that the terms of the trial court's injunction are ambiguous and therefore unenforceable. This issue was not raised by appellant in its opening brief. While we recognize that this court may consider new issues raised by an amicus on appeal (see *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 709-713), we decline to do so here.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA, Plaintiffs, vs. CITY OF BURBANK, a municipal corporation, Defendant.	Case No. BC 221942 STATEMENT OF DECISION Judge Alexander H. Williams, III Department 35 November 16, 2000 (Filed Nov. 16, 2000)

I. Procedural History

On December 20, 1999, Plaintiffs filed their complaint seeking declaratory judgment and injunctive relief prohibiting the City of Burbank from commencing City Council meetings with prayer invoking the name of Jesus Christ.

A Court Trial was conducted on November 3 and November 16, 2000.

The Court hereby issues its Tentative Decision and Proposed Statement of Decision.

II. Acknowledgements

The Court commends all involved in this case for the respect and consideration they have shown for each other, for the Court, and for the Constitution. Counsel for both sides, and all parties and witnesses, have displayed the utmost commitment to the exercise of their duties in a fashion that respects the rights of all in the highest traditions of our Constitution.

III. Decision

A. Facts

On November 23, 1999, the Burbank City Council met in official regular session. A tape of pertinent parts of the meeting was admitted into evidence in this trial.

The presiding officer, after welcoming all in attendance, said "We will begin tonight's meeting with an invocation by . . . " and identified a minister from a local church who would give the invocation.

The presiding officer, the other members of the Council and, from the appearances on the tape, all others in attendance, rose to their feet. The minister went to the lecturn centered in front of the Council members and delivered an invocation.

The contents of the invocation are not the subject of contention in this law suit, except for the last words, wherein the minister concluded by saying " . . . and we express our gratitude and our love in the name of Jesus Christ. Amen."

The minister delivering the invocation was an unpaid volunteer provided by the Burbank Ministerial Association, a non-governmental organization whose current membership includes Christian and Jewish clergy members. The BMA has provided volunteer clergy members to offer invocations at Burbank City Council meetings for a number of years. All observers reported that references to Jesus Christ have been made in less than fifty per cent of the invocations.

Neither the City of Burbank nor the Burbank Ministerial Association provides any instructions or guidance to clergy members as to the content of invocations. Nor does either wish to do so.

Some members of the BMA by training and/or conviction find themselves required to invoke their particular deity and beliefs whenever they pray, even in environs outside the confines of their sect. Others, as a matter of philosophy or consideration and respect, are willing and able to, and frequently do indeed, offer public invocations in a manner that does not refer to the beliefs of a particular sect. In other words, many members of the clergy are available to offer non-sectarian prayer at Burbank City Council meetings.

B. Law

Because the Court deems the decision in this case to be driven by the requirements of the Constitution of the United States of America, no address is being made to the requirements of the Constitution of the State of California.

The First Amendment to the United States Constitution (which is also therefore the First of our Bill of Rights) guarantees to all the free exercise of religion (Free Exercise Clause) and prohibits the government from taking any steps to effect the establishment of religion (Establishment Clause).

The United States Supreme Court has consistently recognized "the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity

. . . must comport with the First Amendment." *Santa Fe Independent School District v. Doe*, ___ U.S. ___, 120 S.Ct. 2266, 2278 (2000).

The Establishment Clause is not violated when a legislative session is opened with a prayer by a chaplain. Indeed, the chaplain can be paid by the government. *Marsh v. Chambers*, 463 U.S. 783 (1983). The Court said: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786.

However, it is important to note that the Supreme Court in *Marsh* was dealing with a prayer which made no reference to Jesus Christ. *Marsh*, 463 U.S. at 793, footnote 14. This is significant, because the Court went on to say: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, 463 U.S. at 794-5.

Does an expression of "our gratitude and our love in the name of Jesus Christ" render a prayer impermissibly sectarian in violation of the Establishment Clause? The case law since *Marsh* inescapably suggests that it does. In numerous decisions, prayer invoking the name of Jesus Christ has been identified as sectarian, and prayer that does not has been identified as acceptably non-sectarian.

See County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989); *Lee v. Weissman*, 505 U.S. 577, 589 (1992); *Santa Fe Independent School District v. Doe*, ___ U.S. ___, 120 S.Ct. 2266 (2000).

It should be noted that this case does not involve the even more difficult issue of school prayer. In such cases, the Supreme Court has held that, due to the unique susceptibility of adolescents to peer and social pressure and the control that school authorities necessarily have over student activities, even non-sectarian prayer at school events violates the Establishment Clause. *Lee v. Weissman, supra; Santa Fe Independent School District v. Doe, supra*. By contrast, with respect to legislative sessions, the status of the law today is that non-sectarian prayer is permitted but sectarian prayer is not.

Finally, is it permissible under the Constitution for the City of Burbank to provide guidance concerning the content of invocations offered as part of City Council meetings? Plainly it is. "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review & Advosory* [sic] *Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995).

IV. Finding.

The Court therefore finds for the Plaintiff and against the Respondent. The Court will enter Declaratory Judgment that opening the City Council meeting on November 23, 1999 with the prayer in this case violated the Establishment Clause of the United States Constitution. The Court will issue an Injunction prohibiting the inclusion of sectarian prayer in City Council meetings.

In making this determination, the Court repeats its appreciation of the respect that all parties, counsel and witnesses have displayed in this case. The Court fully understands the reluctance of the City Council and the Burbank Ministerial Association to dictate the content of prayer. All that is required is an advisement that sectarian prayer as part of City Council meetings is not permitted under our Constitution. From the evidence adduced at trial, the Court is confident that such guidance is acceptable to a large number of clergy members who will continue to provide the volunteer service that they have so commendably provided to the City Council and to the people of the City of Burbank throughout the years.

Date: November 16, 2000

/s/ Alexander H. Williams III
ALEXANDER H. WILLIAMS III

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 11/16/00

HONORABLE ALEXANDER H. WILLIAMS III JUDGE

HONORABLE JUDGE PRO TEM

5.

NONE Deputy Sheriff

DEPT. 35

F. MOREAU DEPUTY CLERK

R. E. LEE CRTRM ASST.

ELECTRONIC RECORDING MONITOR

TRACEY WILSFORD, CSR 7115 Reporter

1:30 pm	BC221942	Plaintiff
	IRV RUBIN	Counsel ROGER JON DIAMOND (X)
	VS	Defendant
	CITY OF BURBANK	Counsel JULI C. SCOTT (X)

NATURE OF PROCEEDINGS

COURT TRIAL AO

Trial continued from November 3, 2000, resumes with all counsel present as heretofor.

All sides rest. The Court distributes a written tentative ruling and the cause is argued.

The Court adopts the Court's written Tentative Decision, it is signed and filed this date, and incorporated herein by reference.

The Court finds for the Plaintiff and against the defendant. The Court will enter Declaratory Judgment that opening the City Counsel meeting on November 23, 1999 with the prayer in this

case violated the Establishment Clause of the United States Constitution The Court will issue and [sic] Injunction prohibiting the inclusion of sectarian prayer in City Council meetings.

All exhibits are ordered returned to submitting Counsel to be held and preserved pending expiration date of time for appeal.

Counsel for the Plaintiff is to prepare and submit proposed Injunction.

APPENDIX D

Court of Appeal, Second Appellate District,
Division Two – No. B148288
S110765

IN THE SUPREME COURT OF CALIFORNIA

En Banc

IRV RUBIN, Plaintiff and Respondent,

v.

CITY OF BURBANK, Defendant and Appellant.

(Filed Dec. 18, 2002)

Petition for review DENIED.

Baxter, J., and Brown, J., are of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice